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September 20, 2005

#### **AGENDA ITEM 4**

**TO: MEMBERS OF THE BENEFITS AND PROGRAM ADMINISTRATION  
COMMITTEE**

- I. SUBJECT:** Proposed Revisions to the Full Board Hearing Procedures (First Reading)
- II. PROGRAM:** Legal
- III. RECOMMENDATION:** Adopt revisions to the current full Board hearing procedures to revise the allocation of time for presentation of oral argument by parties who share the same position.
- IV. ANALYSIS:**

This agenda item proposes that the Board amend its procedures for conducting full hearings.<sup>1</sup> The purpose of the proposed revisions is to change the allocation of time for oral argument so that the total amount of time for oral arguments for staff's position and respondent's position is the same, without regard to the number of parties presenting argument. Attachment A contains the proposed modifications to the full hearing procedures, with the proposed changes indicated by underlining and strikethrough.

**Background:**

When the Board declines to adopt the Proposed Decision of an Administrative Law Judge and decides the case itself, the Administrative Procedure Act authorizes the Board to make its decision on the record, and provides that the Board "shall not decide any case...without affording the parties the opportunity to present either oral or written argument...." before the Board. [Gov. Code § 11517(c)(2)(E)(ii).] The Board's current procedures allow both written and oral

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<sup>1</sup> Full hearings result when the Board declines to adopt the Proposed Decision of an Administrative Law Judge following an administrative hearing and decides instead to review the full record of that hearing. The Board's existing procedures for full hearings were adopted in November 1991 and last revised in April 2002.

argument, and generally allocate 15 minutes to CalPERS counsel to present oral argument in support of staff's position, and 15 minutes to each respondent to argue respondents' positions. Under the current procedures, if there are several respondents, each respondent is entitled to 15 minutes to present his or her position. At a recent full Board hearing the member and his employer were each respondents, and each received 15 minutes to present their respective positions, and CalPERS counsel received 15 minutes to present staff's position. At that hearing, the employer's position was similar to that taken by CalPERS staff. Consequently, the procedures had the effect of allowing 30 minutes of oral argument which supported staff's position and 15 minutes of oral argument which supported the member's position. Although the Board ruled for the member, after the hearing a Board member commented about the allocation of time among parties who share the same position. The proposed revisions address the comment by allocating time for oral argument among the parties who share the same position, so that each position is entitled to the same total amount of time.

**Proposed Allocation of Time for Oral Argument:**

Under the proposed revision, CalPERS staff, and any party who shares the position taken by staff, has a total of 15 minutes to present oral argument. The total time for staff's position shall be allocated on a pro rata basis among all the parties who share that position, unless those parties agree among themselves to allocate their time differently. (Attachment A, section III. B. 6 and 8.<sup>2</sup>) Under this proposed revision, if the member's employer is named as a respondent, but shares the position taken by CalPERS staff, CalPERS counsel and the employer would each have seven and a half minutes to present oral argument. Similarly, respondent, and any party who shares respondent's position, has a total of 15 minutes for oral argument, allocated on a pro rata basis. The current procedures provide for a maximum of five minutes for rebuttal argument, and under the proposed revision this would also be divided evenly among the parties. (Section III. B. 9.) The proposed revisions retain the right for parties to request additional time for oral argument, but provide that if additional time is granted to one party, the total time designated for the parties who share the opposing position will be similarly extended. (Section III. C. 2.)

These proposed revisions are based on the division of time for oral argument before the California Courts of Appeal and the California Supreme Court as provided by the California Rules of Court. Under those rules, each side is generally allowed 30 minutes for argument, and the court has the right to apportion time among multiple parties who are on the same side and also to extend the time. The Legal Office believes that revising the procedures for full

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<sup>2</sup> All subsequent citations to the Procedures are to Attachment A.

Board hearings as discussed in this item would be consistent with the model used by the courts.

**V. STRATEGIC PLAN:**

This proposal is not part of the Strategic Plan. The revised procedure supports Goal III (design, develop, and administer benefit programs and business processes that are innovative, effective, efficient, and valued by our members, employers, and stakeholders).

**VI. RESULTS/COSTS:**

There are no additional costs to adopting the revised procedures. Adoption of the revised procedures will establish a consistent total amount of time for presentation of oral argument by parties who share the same position, while retaining the Board's current authority to expand the time, upon request, as the Board determines is appropriate.

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